

Mohd Nazri bin Omar & Ors v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
B-05-124-05 OF 2012, B-05-125-05 OF 2012, B-05-126-05 OF 2012
AND B-05-127-05 OF 2012
BALIA YUSOF, TENGKU MAIMUN AND UMI KALTHUM JJCA
12 JUNE 2014

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*Criminal Procedure — Appeal — Appeal against conviction and sentence
— Appeal against decision of High Court — Accused persons convicted for charge
of drug trafficking and sentenced to death — Dangerous Drugs Act 1952
s 39B(1)(a) — Drug trafficking ambushed aided by informer — Non-calling of
informer — Whether detrimental to prosecution’s case — Whether s 114(g) of the
Evidence Act 1950 should be invoked — Defective charge — Whether there was
misdirection by trial judge — Whether prima facie established — Whether
conviction and sentence safe*

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Police officer SP6 had carried out investigation and assumed the role of a drug
purchaser to meet and negotiate with the third appellant for the purchase of
1kg of syabu at the price of RM135,000. The transaction was to take place on
the same day. After that, SP6 received a phone call from the fourth appellant
who informed the former that he was a friend of the third appellant. SP6 was
asked to come to a karaoke room at Red Box Karaoke (‘Red Box’) that night to
conclude the deal. The same night, upon arriving at Red Box, SP6 gave the car
keys to one Long Chai to get the money and Long Chai returned with a black
bag. The third appellant made a phone call and the fourth appellant arrive and
informed SP6 that his friend would bring the drugs. SP6 then went together
with the third and fourth appellants to meet the friend whose car was park
outside. In the car were the first and second appellants. The second appellant
handed a plastic bag to SP6 and SP6 was satisfied that they were drugs. SP6 left
the car and asked the fourth appellant to wait as he had to collect the money for
payment. Later, SP6 joined the appellants again and the police sprung into
action. The drugs seized were 595.7g of methamphetamine. The appellants
were charged for an offence of trafficking in dangerous drugs under s 39B(1)(a)
of the Dangerous Drugs Act 1952 (‘DDA’). At the end of the trial, the trial
judge held that the prosecution had proven its case beyond reasonable doubt.
All the appellants were found guilty as charged and sentenced to death. Hence,
the present appeal. The issues that arose for the court’s determination were
whether the failure of the prosecution to call Long Chai or to tender his s 112
of the Criminal Procedure Code (‘CPC’) statement had compromised the case
for the prosecution; whether the trial judge had failed to make a finding of
actual possession of the drugs or under the presumption under s 37 (d) of the
DDA; whether the trial judge had failed to make a finding of trafficking under

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A ss 2 or 37 (da) of the Act; whether the prosecution had failed to prove a prima facie case against the appellants; and whether the trial judge had convicted the appellants on a defective charge.

B **Held**, allowing all appeals and setting aside conviction and sentence; acquitting and discharging all appellants:

C (1) Even though Long Chai was not an informer, based on the evidence of his role in the sting operation, he was a material witness who should have been called as a witness by the prosecution. The submissions that the prosecution did make an effort to produce Long Chai but that the effort was to no avail could not be accepted. Long Chai had earlier come to the court to be identified. As the trial judge had failed to consider this issue and had failed to invoke s 114(g) of the Evidence Act against the prosecution for failing to produce Long Chai or his s 112 of the CPC statement, there was a non-direction by the trial judge which had amounted to a serious misdirection and thereby gave rise to a miscarriage of justice (see para 21).

E (2) The informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur for it was he who had put the appellant in touch with the undercover agent. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus, he had lost the protection from disclosure of identity normally accorded to informers under s 40 of the DDA (see para 23).

G (3) The trial judge had failed to make a finding of possession of the drugs whether by the clear evidence of knowledge and possession or by invoking the presumption of possession under s 37(d) of the DDA. The trial judge did indeed fail to state under which section of the Act he had found the appellants to be trafficking in the drugs. This had led the trial judge to make no finding as to whether the defence had rebutted the same or not (see paras 25–26).

H (4) The trial judge had convicted the appellants for trafficking in ‘Syabu anggaran berat 917 gram’. This finding had contradicted that of the chemist, who stated that the weight of the drugs methamphetamine was 595.7g. This showed that the trial judge had not applied his mind to the weight and type of drugs the appellants were accused of trafficking before convicting all the appellants. The trial judge had erroneously directed his mind to a charge which was contrary to the charge let alone to the evidence led by SP1. There had been a grave misdirection which amounted to a non-direction by the trial judge. A prima facie case had not been made out by the prosecution and consequently the appellants should not have been called to tender in their defence (see paras 30–31).

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[Bahasa Malaysia summary]

Pegawai polis SP6 telah menjalankan penyiasatan dan memainkan peranan sebagai pembeli dadah untuk bertemu dan berunding dengan perayu ketiga bagi pembelian 1kg syabu pada harga RM135,000. Transaksi tersebut berlaku pada hari yang sama. Selepas itu, SP6 menerima satu panggilan telefon daripada perayu keempat yang memaklumkan kepadanya bahawa dia adalah rakan kepada perayu ketiga. SP6 juga diminta untuk datang ke bilik karaoke di Karaoke Red Box ('Red Box') pada malam tersebut untuk memuktamadkan pengurusan. Pada malam yang sama, apabila tiba di Red Box, SP6 memberikan kunci kereta kepada seorang yang bernama Long Chai untuk mendapatkan wang dan Long Chai kembali dengan satu beg hitam. Perayu ketiga membuat panggilan telefon dan perayu keempat tiba dan memaklumkan SP6 bahawa rakannya akan membawa dadah-dadah tersebut. SP6 kemudian pergi bersama-sama dengan perayu-perayu ketiga dan keempat dan berjumpa dengan rakan yang keretanya diletakkan di luar. Dalam kereta tersebut, terdapat perayu pertama dan kedua. Perayu kedua menyerahkan satu beg plastik kepada SP6 dan SP6 berpuas hati bahawa kesemuanya adalah dadah. SP6 meninggalkan kereta tersebut dan meminta perayu keempat untuk menunggu kerana dia perlu mengambil wang bagi pembayaran. Kemudian, SP6 menyertai perayu-perayu semula dan pihak polis mula bertindak. Dadah-dadah yang dirampas tersebut adalah 595.7g methamphetamine. Perayu-perayu dipertuduh bagi kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di penutup perbicaraan, hakim bicara memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kesnya melampaui keraguan munasabah. Kesemua perayu didapati bersalah seperti yang dipertuduh dan dijatuhkan hukuman mati. Oleh itu rayuan ini. Isu-isu yang timbul bagi penentuan mahkamah adalah sama ada kegagalan pihak pendakwaan untuk memanggil Long Chai atau mengemukakan kenyataan s 112 Kanun Tatacara Jenayah ('KTJ') telah menjejaskan kes pendakwaan; sama ada hakim bicara gagal membuat dapatan milikan sebenar dadah-dadah atau di bawah anggapan s 37(d) ADB; sama ada hakim bicara gagal membuat dapat pengedaran di bawah ss 2 atau 37(da) Akta; sama ada pihak pendakwaan gagal untuk membuktikan kes prima facie terhadap perayu-perayu; dan sama ada hakim bicara telah mensabitkan perayu-perayu berdasarkan pertuduhan yang cacat.

Diputuskan, membenarkan kesemua rayuan dan mengetepikan sabitan dan hukuman; membebaskan dan melepaskan kesemua perayu:

- (1) Walaupun Long Chai bukanlah pemberi maklumat, berdasarkan keterangan peranannya dalam operasi yang dijalankan, dia adalah saksi material yang sepatutnya dipanggil sebagai saksi oleh pihak pendakwaan. Hujahan-hujahan bahawa pihak pendakwaan telah membuat usaha untuk mengemukakan Long Chai tetapi usaha tersebut tidak membuahkan hasil tidak boleh diterima. Long Chai pernah hadir di

- A mahkamah untuk dikenal pasti. Oleh kerana hakim bicara gagal mempertimbangkan isu ini dan gagal untuk membangkitkan s 114(g) Akta Keterangan 1950 terhadap pihak pendakwaan atas kegagalan mengemukakan Long Chai atau kenyataan s 112 KTJ, berlaku
- B ketidakarahan oleh hakim bicara yang terjumlah kepada salah arah yang serius dan dengan itu menyebabkan kegagalan keadilan (lihat perenggan 21).
- (2) Pemberi maklumat, berdasarkan peranannya, bukanlah sekadar pemberi maklumat sahaja, tetapi telah mengambil peranan ejen perangkap kerana
- C dialah yang menghubungkan perayu dengan ejen yang menyamar. Tidak dapat disangkal, dia adalah instrumen penting yang mana tanpa campur tangannya, perayu tidak mungkin dapat ditangkap. Identitinya bukan lagi menjadi rahsia dan oleh itu, dia telah hilang perlindungan daripada pendedahan identiti yang kebiasaannya diberikan kepada
- D pemberi-pemberi maklumat di bawah s 40 DDA (lihat perenggan 23).
- (3) Hakim bicara telah gagal membuat dapatan milikan dadah sama ada berdasarkan keterangan jelas pengetahuan dan milikan atau dengan membangkitkan anggapan milikan di bawah s 37(d) ADB. Hakim bicara telah gagal untuk menyatakan seksyen mana dalam Akta yang telah dia gunakan untuk memutuskan perayu-perayu mengedar dadah. Ini telah menyebabkan hakim bicara tidak membuat apa-apa dapatan sama ada pembelaan telah menyangkal perkara ini atau tidak (lihat perenggan 25–26).
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- F (4) Hakim bicara telah mensabitkan perayu-perayu bagi pengedaran syabu anggaran berat 917g. Dapatan ini bercanggah dengan dapatan ahli kimia, yang menyatakan bahawa berat dadah methamphetamine adalah 595.7g. Ini menunjukkan bahawa hakim bicara tidak mengarahkan mindanya kepada berat dan jenis dadah-dadah yang mana perayu-perayu
- G dipertuduh bagi mengedar sebelum mensabitkan perayu-perayu. Hakim bicara telah secara khilaf mengarahkan mindanya kepada pertuduhan yang bercanggah dengan pertuduhan, apatah lagi keterangan oleh SP1. Terdapat salah arah serius yang terjumlah kepada ketidakarahan oleh hakim bicara. Satu kes prima facie tidak dapat dibuktikan oleh pihak
- H pendakwaan dan oleh itu, perayu-perayu tidak sepatutnya dipanggil untuk mengemukakan pembelaan mereka (lihat perenggan 30–31).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Alcontara all Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

- Azahan bin Mohd Aminallah v PP* [2005] 5 MLJ 334; [2005] 1 CLJ 374, CA (refd) **A**
- Chan Chor Shuh v PP* [2003] 2 MLJ 26, CA (refd)
- Ti Chuee Hiang v PP* [1995] 2 MLJ 433, SC (refd)
- Wan Yurillhami bin Wan Yaacob & Anor v PP* [2010] 1 MLJ 749; [2010] 1 CLJ 17, FC (refd) **B**

Legislation referred to

- Criminal Procedure Code s 40, 112
- Dangerous Drugs Act 1952 ss 2, 37(d), (da), 39B(1)(a) **C**
- Evidence Act 1950 s 114(g)

Appeal from: Criminal Case No 45A-119 of 2011 (High Court, Shah Alam)

- Afifudin bin Ahmad Hafifi (Salehuddin b Saidin & Assoc) for the first appellant.* **D**
- Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the second and third appellants.*
- Suzana Norlihan bt Alias (Gooi & Azura) for the fourth appellant.*
- Aslinda bt Ahad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Umi Kalthum JCA:

[1] The appellants were charged for an offence of trafficking in drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act. The charge reads as follows:

Bahawa kamu bersama-sama pada 26 December 2010 jam lebih kurang 12.30 malam, dalam motokar jenis Proton Wira, warna biru, nombor pendaftaran BEF 9628, di Lebuhraya NPE (New Pantai Express), di hadapan Pasaraya Sunway Pyramid, Bandar Sunway, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan dengan niat bersama telah mengedar dadah berbahaya sejumlah berat 595.7 gram Methamphetamine, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama seksyen 34 Kanun Keseksan. **G**

THE PROSECUTION'S CASE

[2] On 24 December 2010 at about 7pm SP4 had instructed SP6 to investigate on a lead that there was drug trafficking activity at Taman Connaught, Cheras. In this investigation, SP6 was to assume a position as a drug purchaser. On 25 December 2010, SP6 met the third appellant and negotiated with him for the purchase of 1kg of syabu ('the drug'). The price was agreed at RM135,000. The transaction was to take place on the same day. After that, SP6 received a telephone call from the fourth appellant whereby the fourth appellant told SP6 that he was a friend of the third appellant. SP6 asked **I**

A the fourth appellant to come to a karaoke room at Red Box Karaoke, Sunway Pyramid ('Red Box') that night to conclude the deal.

B [3] SP6 then informed SP4 to make a move to Red Box as SP6 had booked two rooms, that is, rooms No 11 and No 12. SP6 went into room No 11 together with a person named Long Chai. SP6 also informed the third appellant about the meeting place at room No 11 at the Red Box. At 8.30pm SP6 called the third appellant's handphone and was informed that the fourth appellant would bring the drugs.

C [4] At 9.37pm SP6 contacted the fourth appellant and asked the fourth appellant whether he really had the drugs with him. Then, SP6 asked about the price of 1kg of syabu. The fourth appellant confirmed that he had the drugs with him and the price was RM135,000. SP6 queried about the quality of the drugs because it was priced lower than the usual market price of RM180,000 per kg of syabu. The fourth appellant replied that the quality of the drugs was guaranteed because the drugs originated from Iran.

D [5] At 10.45pm, the third appellant arrived at the Red Box and went into room No 11. While waiting for the fourth appellant, the third appellant requested SP6 to show him the money. SP6 gave Long Chai the car keys to get the money from his car and bring the money into the room. Long Chai returned to the room with a black bag. SP6 then showed the money in the black bag to the third appellant. The third appellant then made a telephone call.

E [6] At 11.30pm, the fourth appellant entered the room No 11 and met SP6 and Long Chai. The fourth appellant informed SP6 that his friend would bring the drugs and that the friend was still on the way there. At 11.45pm, the fourth appellant informed SP6 that his friend had brought the drugs. SP6 together with the third and fourth appellants then went to a car, Proton Wira bearing registration No BEF 9628 ('the car'). The car was parked by the roadside opposite Opera, an entertainment centre.

F [7] The fourth appellant invited SP6 to get in to the car. In the car, the first appellant was seated on the driver's seat whilst the second appellant was at the front passenger seat. SP6 and the fourth appellant got into the back seat whilst the third appellant remained outside the car. The second appellant then handed SP6 a plastic bag (exh P9). SP6 opened it, checked its contents and then returned it to the second appellant. SP6 was satisfied that the drugs were in the plastic bag.

G [8] SP6 then invited the first, second and fourth appellants to return to Red Box to have the drugs tested. The second appellant then responded by saying 'Boss, today 5 kilos I have already pushed. This is the last. If my quality drug is

no good, I refund the money. No need to test drug in the karaoke room. We do in road side'. The first appellant also reassured SP6 that the drugs were of good quality. A

[9] SP6 left the car and asked the fourth appellant to wait as he had to collect the money for payment. SP6 went back to Red Box, to room No 12 and called up SP4 to meet him at the toilet. SP6 briefed SP4, that the drugs were in the car bearing registration No BEF 9628. SP6 then went to his car with Long Chai. He drove his car out to NPE Highway and then to the earlier spot. The third and fourth appellants were standing by the road side but the car was not there. The fourth appellant then requested SP6 to go to the car which was parked at the opposite side of the road. SP6 refused and demanded whether the fourth appellant really wanted to conclude the deal. The fourth appellant then made a telephone call. Then the first appellant came and parked the car behind SP6's car. SP6 walked towards the car, opened the car door and took out the car keys and shouted 'Police'. The police raiding team came and made the arrest on all the appellants. B C D

[10] SP1 had analysed the drugs seized during the raid and found them to be methamphetamine weighing 595.7g. E

THE APPELLANTS' DEFENCE

[11] The first, second and fourth appellants chose to give sworn statements. The first and second appellants testified that they know each other. They made a plan to attend a Christmas party at Sunway Lagoon. On the night before they were arrested, the first appellant went to the second appellant's place to fetch him. As the second appellant went to the first appellant's car, he noticed a Jaya Jusco plastic bag on the floor at the front passenger seat upon entering the car. The first appellant however claimed that the first time he saw the plastic bag was at Puchong Police Station that is after he was arrested. He had no knowledge about the plastic bag as well as its contents. Both the first and second appellants testified that they did not know the third and the fourth appellants prior to the arrest. F G

[12] The third appellant gave an unsworn testimony and denied having a drug deal with SP6. Instead, the third appellant named a Malay woman by the name of Linda, who actually wanted to sell the drugs to SP6 for RM135,000. The third appellant went to Red Box because he was told by Linda that SP6 wanted to see him. There, he was asked by SP6 about drugs for sale but he claimed, he had no drugs. The third appellant got drunk and he passed out. The third appellant was arrested when he was trying to locate his car outside Red Box. The third appellant didn't know the first, second and the fourth appellants in this case. H I

- A** [13] The fourth appellant testified that on the night of the arrest, he had gone to Disco Opera at Sunway Pyramid. It was Long Chai who had invited him to go there. The fourth appellant denied having a telephone conversation with SP6 and denied entering room No 11 together with SP6 and the third appellant. The fourth appellant also denied knowing the first, second and the third appellants. The fourth appellant was arrested at the road side on his way back home.
- B**

- C** [14] At the end of defence case, the learned trial judge held that the prosecution had proven its case beyond reasonable doubt. All the appellants were found guilty as charged and sentenced to death as mandated under s 39B(2) of the Act.

THE APPEAL

- D** [15] As the appellants had chosen to adopt each other's submission, for ease of dealing with the issue raised by them respectively we had referred to the issues as applying to all the appellants, unless the context otherwise required. Before us the appellants challenged the decision of the learned trial judge by raising the following issues:
- E**
- (a) whether the failure of the prosecution to call Long Chai or to tender his s 112 of the Criminal Procedure Code ('CPC') statement had compromised the case for the prosecution;
- F**
- (b) whether the learned trial judge had failed to make a finding of actual possession of the drugs or under the presumption under s 37(d) of the Act;
- (c) whether the learned trial judge had failed to make a finding of trafficking under ss 2 or 37(da) of the Act;
- G**
- (d) whether the prosecution had failed to prove a prima facie case against the appellants;
- (e) whether the learned trial judge had failed to appreciate the defence of the appellants;
- H**
- (f) whether the learned trial judge had convicted the appellants on a defective charge.

Long Chai

- I** [16] It was submitted by learned counsel for the second and third appellants that the failure of the prosecution to call Long Chai as a witness or to tender his s 112 of the CPC statement had compromised the case for the prosecution. It was submitted that Long Chai was not an informer. His identity had been declared in open court as he was called and identified by SP6. His name is Lai

Kwee Loong (I/C No 790928–14–6285). Therefore he cannot claim protection under s 40 of the Act. **A**

[17] The defence counsel submitted that Long Chai can be appropriately described as an agent provocateur number two, other than SP6. The role played by Long Chai was highlighted as follows: **B**

- (a) according to SP4, Long Chai was recruited to lend credence that SP6 (Insp Mohana Sundaram a/l Vrejenan) was the purchaser of the drug; **C**
- (b) according to SP6, Long Chai would be his assistant in the event, Jimmy (the third appellant) spoke in Chinese;
- (c) SP6 and Long Chai went to meet with the informer to get the hand phone number of the third appellant;
- (d) on 25 December 2010 both SP6 and Long Chai went to Hotel Sun Inn; **D**
- (e) Long Chai spoke to the third appellant in Chinese to the effect 'kita tak boleh mari rumah you pasal bawa duit takut jadi apa-apa dengan duit ini lebih baik you mari ambil duit', in essence to reinforce what SP6 had said earlier to the third appellant; **E**
- (f) after that both SP6 and Long Chai went to Neway Karaoke at Subang Jaya to look for a room for the transaction;
- (g) SP6 was instructed by SP4 to rent two rooms at Red Box, one meant for SP6 and Long Chai and the other for the raiding team. Long Chai accompanied SP6 to book the two rooms; **F**
- (h) SP4 instructed SP6 to keep the bag containing the money in his car and in the event either the third or fourth appellant wanted to have sight of the money to send Long Chai to get it from his car and this would be a signal to SP4 that the transaction would take place; **G**
- (i) both SP6 and Long Chai then went inside room 11;
- (j) when the third appellant came into room 11, SP6 introduced Long Chai as one of his men; **H**
- (k) SP6 then instructed Long Chai to go to his car to collect the money when the third appellant asked for the money. Long Chai then brought the bag containing the money;
- (l) after the third appellant was satisfied with the money Long Chai was asked by SP6 to keep the money back in the car; **I**
- (m) SP6 instructed Long Chai to consume the drug in the event the fourth appellant requested them to do so; and

A (n) after SP6 had briefed SP4 in the toilet, both SP6 and Long Chai left room 11 to go to SP6's car where SP6 drove the car with Long Chai as passenger to where the Proton/car was parked.

B Based on the above, it was submitted that Long Chai had played a major role akin to that of an agent provocateur and was in fact agent provocateur number two from the beginning till the arrests of the appellants. Three cases were cited as authorities on this issue. They are *Wan Yurillhami bin Wan Yaacob & Anor v Public Prosecutor* [2010] 1 MLJ 749; [2010] 1 CLJ 17 (FC); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 (SC); *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26 (CA).

D [18] The appellants submitted that s 114(g) of the Evidence Act 1950 ('Evidence Act') should be invoked against the prosecution for failing to produce Long Chai as a witness, failing to offer him for cross-examination and failing to produce Long Chai's s 112 statement as:

- E (a) it was insufficient for the prosecution to adduce evidence through SP10, the investigating officer, that she had recorded a statement from Long Chai, that attempts were made to locate him to no avail;
- (b) no reason was given as to why the s 112 statement, which was in the possession of the prosecution, could not be produced;
- F (c) the appellants were disadvantaged by the non-production of Long Chai or his s 112 statement as it had made them unable to challenge the evidence of SP6 effectively.

G [19] It was also submitted that there was absolutely no consideration by the learned trial judge on this issue of Long Chai and the consequence of the failure to produce him or his s 112 statement. This had prejudiced all the appellants. This non-direction amounted to a serious misdirection and had given rise to a miscarriage of justice.

H [20] It was the respondent's/prosecution's submission that there was no need to call Long Chai to give evidence as he was not a material witness to the prosecution's case. That the evidence given by SP6 was sufficient to prove the involvement of all the appellants. If Long Chai had been called as a witness, he would be in the position to further fortify the prosecution's case as he was with SP6 at the material time. Moreover, it was submitted that Long Chai was not present at the car, when SP6 and the fourth appellant had entered the car driven by the first appellant with the second appellant as his passenger.

[21] We had perused the grounds of judgment of the trial judge and we found that he had failed to give any consideration on this issue. Even though

Long Chai was not an informer, based on the evidence of his role in the sting operation as elucidated by learned counsel in para 17 above, we were of the view that Long Chai was a material witness who should have been called as a witness by the prosecution. We could not accept the submissions of the learned deputy that the prosecution did make an effort to produce Long Chai but that the effort was to no avail, seeing that on 24 October 2011 Long Chai came to court to be identified by SP4. As the learned trial judge had failed to consider this issue and had failed to invoke s 114(g) of the Evidence Act against the prosecution for failing to produce Long Chai or his s 112 statement, we agreed with the submissions of the appellants that there was a non-direction by the learned trial judge which had amounted to a serious misdirection and thereby gave rise to a miscarriage of justice.

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[22] In the case of *Ti Chuee Hiang v Public Prosecutor*, Edgar Joseph Jr FCJ at p 440 para D had this to say on the choice of witnesses by the prosecution:

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Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg *Adel Muhammed el Dabbah v A-G of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation — which is nothing less than a statutory duty — the accused must be acquitted.

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In the present case, the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur for it was he who had put the appellant in touch with the undercover agent, Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus, he had lost the protection from disclosure of identity normally accorded to informers under s 40 of the Act.

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In these circumstances, he came within the category of witnesses described by Lord Roche in *Seneviratne*, as ‘witnesses essential to the unfolding of the narratives on which the prosecution case is based’. The same might be said of the informer’s friend.

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[23] As for Long Chai not being present at the car, we were not able to agree with the submissions of the learned deputy, since, and as highlighted by the appellants’ counsel, the notes of evidence at pp 118, 119 *Jld 2*, AR, showed SP6 as stating the following:

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Lepas jumpa SP4 di tandas saya pergi ke bilik No.11 Red Box dan bawa Long Chai ke kereta saya pada jam lebih kurang 12.15 pagi, 26.12.2010.

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Saya pandu kereta dan Long Chai di sebelah saya. Saya terus ke Lebuhraya NPE dan pergi ke tempat kereta BEF 9628. Sampai di sana saya nampak OKT 3 dan OK4 berdiri di tepi jalan dan saya tak nampak kereta BEF 9628 di situ

A ...

Lepas perbualan OKT 4 saya lihat kereta BEF 9628 datang ke belakang kereta saya — jarak lebih kurang 2 meter.

B *Possession*

C [24] It was the submission of the first appellant that nowhere in his judgment did the learned trial judge make a finding that the first appellant (as well as the other appellants) had knowledge and possession of the drugs or that the learned trial judge had invoked the statutory presumption of possession under s 37(d) of the Act. The first appellant submitted that the prosecution could not show through his witnesses that the first appellant had knowledge that the drugs were dangerous drugs. Evidence showed that the first appellant was only trying to avoid the car driven by the police when it crashed into the car

D BEF 9628.

E [25] We agreed with the submission of the appellants that the learned judge had failed to make a finding of possession of the drugs whether by the clear evidence of knowledge and possession or by invoking the presumption of possession under s 37(d) of the Act. This, we found was another misdirection by the learned trial judge. In fact the learned deputy had conceded on this issue during the hearing of the appeal.

Trafficking

F

G [26] It was submitted by the first appellant that the learned trial judge did not state whether it was under s 37(da) or under s 2 of the Act that he had called upon all the appellants to enter their defence for an offence of trafficking in drugs. This failure on the part of the learned trial judge had prejudiced the appellants who did not know what burden of proof had been placed upon them in putting up their defence. Moreover, at the end of the defence case, the learned trial judge did not state whether the; appellants were successful in rebutting the statutory presumption or raised a reasonable doubt. It was submitted that it was incumbent upon the trial judge to make a ruling whether

H the appellants had rebutted the presumption or had either raised a reasonable doubt or both. A failure to make a finding on this issue was a grave misdirection and fatal in law.

I [27] We agreed with the submissions of learned counsel for the first appellant on this issue as we found that the learned trial judge did indeed fail to state under which section of the Act he had found the first appellant/appellants to be trafficking in the drugs. This had led the learned judge to make no finding as to whether the defence had rebutted the same or not. As such, we found the learned trial judge had again seriously misdirected himself. Of relevance, and as

quoted by learned counsel, is the Federal Court case *Alcontara all Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705, where Edgar Joseph Jr FCJ (as be then was) in delivering the judgment of the court, stated as follows at pp 219–220 (MLJ); p 720 (CLJ), paras a–c:

A

This bring us to the next point in this appeal. Nowhere in his judgment did the judge direct attention to the statutory presumptions as to possession (s 37(d) and trafficking (s 37(da)), and as a result, he made no finding as to whether the defence had rebutted the same. In our view, i this was a misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ in *Mohammad Radhi bin Yaakob v PP* [1991] 3 MLJ 169, at p 172 para 1:

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In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on the balance of probabilities, the evidence of the defence had rebutted the statutory presumption of trafficking under s 37(da) as a separate exercise even though the Court is satisfied on balance that the presumption of possession under s 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

D

Prima facie case

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[28] It was the first appellant’s submission that in view of the issues on possession, trafficking, and the second and third appellants’ submission on the non-calling of Long Chai and nor his s 112 statement, the learned trial judge had misdirected himself when he failed to give a maximum evaluation of the evidence to find that the prosecution had successfully made out a prima facie case against the appellants and had called for their defence.

F

[29] Without repeating the specifics of the submissions, we agreed with the submissions of learned counsel. As we had found the learned trial judge had misdirected himself on all three issues, the only conclusion that can be derived from that was that a prima facie case had not been made out by the prosecution and consequently the appellants should not have been called to tender in their defence.

G

Defective charge

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[30] The first appellant’s learned counsel drew our attention to the fact that the learned trial judge had convicted the appellants for trafficking in ‘Syabu anggaran berat 917 gram’. This finding had contradicted the evidence of SP1, the chemist, who stated that the weight of the drugs methamphetamine was 595.7g. This showed that the learned trial judge had not applied his mind to the weight and type of drugs the appellants were accused of trafficking before convicting all the appellants. It was submitted that this was a grave misdirection which amounted to a non-direction by the learned judge.

I

A [31] We agreed with learned counsel's submission on this issue. The learned trial judge in his grounds of judgment had laid out the charge faced by the appellants as follows:

B Bahawa kamu bersama-sama pada 26 December 2010 jam lebih kurang 12.30 tengah malam, dalam motokar jenis Proton Wira, warna biru, nombor pendaftaran BEF 9628, di Lebuhraya NPE (New Pantai Express), di hadapan Pasaraya Sunway Pyramid, Bandar Sunway, dalam Daerah Petaling, dalam Negeri Selangor, telah didapati mengedar dadah berbahaya jenis Syabu, anggaran berat 917 gram. Oleh yang demikian kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a), Akta Dadah Berbahaya 1952, yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama dan dibaca bersama Seksyen 34, Kanun Keseksaan.

C

D It was obvious to us that the learned trial judge had erroneously directed his mind to a charge which was contrary to the charge (as quoted above in para 1) tendered by the prosecution as exh P2 (p 738, *Jld* 8, AR), let alone to the evidence led by SP1. We therefore agreed that there had been a grave misdirection which amounted to a non-direction by the learned judge.

Appreciation of defence

E [32] Many points were raised by the appellants on the failure of the learned trial judge to appreciate the defence of the appellants. Suffice for us to deal with a few of them seeing that we had already found for the appellants on the earlier issues.

F [33] The third appellant gave a statement from the dock. It was submitted that the learned trial judge had seriously misdirected himself when he did not give any weight to the third appellant's defence. The learned judge stated at p 724 *Jld* 8 as follows:

G Mahkamah ini membuat pendapat untuk tidak memberi apa-apa keberatan mengenai pernyataan OKT 3 dari kandang pesalah. Hakim Sharma dalam kes *PP v Sanussi* [1970] 2 MLJ 198 telah berkata '... such a statement does not constitute evidence and the accused making such statement cannot be a witness'.

H [34] Learned counsel cited the case of *Azahan bin Mohd Aminallah v Public Prosecutor* [2005] 5 MLJ 334; [2005] 1 CLJ 374, where Gopal Sri Ram JCA (as he then was) said, at p 344 (MLJ); pp 384–385 (CLJ):

I Without going into the matter in any detail, it suffices for us to say that there is a conflict among the High Courts as to whether an unsworn statement from the dock is evidence. *Wong Heng Fatt v Public Prosecutor* [1959] MLJ 20, *Public Prosecutor v Sanassi* [1970] 2 MLJ 198, and *Low Thim Fatt v Public Prosecutor* [1989] 1 MLJ 304 say that it is not evidence. By contrast, Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* [1968] 1 MLJ 53 held that it is evidence. And there are dicta in many other cases, Malaysian, Australian and at least one decided by the Privy Council

which say quite emphatically that such an unsworn statement is evidence for the purposes of a trial. All the relevant cases may be found in two articles published in the Malayan Law Journal. The first is that by that very learned scholar Professor Ahmad Ibrahim in [1975] 2 MLJ vi. The other is by Professor Mohd Akram in [2003] 1 MLJ clxix.

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In our judgment, in the context of s 257(1) the critical phrase is ‘elects to give evidence’ and not ‘elects to give evidence on oath’. The former is much wider than the latter and must ex necessitae rei include the making of an unsworn statement from the dock. We are therefore persuaded that the reasoning of Chang Min Tat J in *Ng Hoi Cheu v Public Prosecutor* is correct. Accordingly, the fact that the appellant elected to make an unsworn statement from the dock did not exclude the operation of s 257(1).

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[35] The learned deputy in her reply submitted that the learned trial judge had the discretion to evaluate the evidence of the third appellant. In this case the learned trial judge had made an evaluation and had decided to reject the third appellant’s evidence.

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[36] We found that the learned trial judge had made an error in not giving any consideration to the third appellant’s defence. The unsworn testimony by the third appellant should have been given due consideration and not dismissed outright because it did not constitute evidence even though in the final analysis it may not have merits. The defence by the third appellant must be considered before a finding of guilt can be made. Here again we found that the learned trial judge had misdirected himself to the detriment of the third appellant.

E

F

[37] The fourth appellant’s defence was that he knew Long Chai prior to his arrest, that Long Chai was his friend. Long Chai had telephoned the fourth appellant and invited the fourth appellant to go to Disco Opera at Sunway Pyramid on the date of the incident. His defence was that if Long Chai had been called as a witness, Long Chai could have been cross-examined on this fact and or at least with the tendering of s 112 statement, the fourth appellant would have the opportunity to rebut the evidence of SP6. As neither Long Chai had been called as a witness nor his s 112 statement had been tendered by the prosecution, injustice had been done to the fourth appellant.

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[38] The fourth appellant also stated that he had never made any telephone calls to SP6 nor spoke to SP6 through the telephone. The telephone No 016-2494484 was not his number. However, the learned trial judge did not believe the fourth appellant’s defence as per his grounds of judgment in pp 731-733, *Jld* 8, AR. It was submitted that the learned judge had misdirected himself when he failed to take into account the following facts:

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- A (a) according to SP6, the fourth appellants' telephone number was 016-2494484. However, SP5 had never stated that the telephone number of exh P28 dan P28(a) (purportedly being the handphone and SIM card seized from the fourth appellant) as being 016-2494484;
- B (b) exh P49 *Lampiran* J2(a) and *Lampiran* J2(b) did not show that the number of exh P28 and P28(a) was 016-2494484. To the contrary, exh P49 *Lampiran* J2(b) clearly showed that the number of the handphone of exh P28(a) as 1111111111;
- C (c) SP6 had never stated that exhs P28 dan P28(a) as being registered in the fourth appellant's name.

D All these facts showed that there was no credible evidence that exhs P28 and P28(a) belonged to the fourth appellant. It also showed that the fourth appellant's defence was true and that he had raised a reasonable doubt against the prosecution's case.

E [39] We had carefully gone through exhs P28, P28(a), P49 *Lampiran* J2(a), *Lampiran* J2(b) and we agreed with the observations made by learned counsel for the fourth appellant and her submissions on this issue. We agreed that, yet again, the learned trial judge had misdirected himself when he failed to duly consider the obvious discrepancies in the evidence of the prosecution vis-a-vis that of the fourth appellant's defence.

F CONCLUSION

G [40] Based on all the above reasons, we had unanimously allowed all the appeals and set aside the conviction and sentence imposed by the learned trial judge. We ordered all the appellants to be acquitted and discharged. We found there were merits in the appellants' submissions that it was not safe to convict all the appellants as there were too many infirmities in the learned judge's findings.

H *Appeals allowed and conviction and sentence set aside; appellants acquitted and discharged.*

Reported by Afq Mohamad Noor

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